PINSKY, SMITH, FAYETTE & KENNEDY, LLP

ATTORNEYS AT LAW
146 MONROE CENTER STREET, NW, SUITE 805
GRAND RAPIDS, MICHIGAN 49503-2818
TELEPHONE (616) 451-8496
FAX (616) 451-9850

H RHETT PINSKY EDWARD (NED) M SMITH MICHAEL L FAYETTE KATHERINE SMITH KENNEDY A. ROBERT KLEINER 1916 - 1987

OF COUNSEL.
H DAVID SOET

EDWARD M. SMITH DIRECT DIAL: (616) 451-9232 E-MAIL: emnedsmith@sbcglobal.net

November 10, 2011

National Labor Relations Board 1099 - 14th Street NW Washington, DC 20570-0001

Re:

Kerry, Inc. -and- Local 70, Bakery, Confectionery, Tobacco and Grain Millers International Union, AFL-CIO Cases 7-CA-52965 and 7-CA-53192

Dear Board:

With regard to the above-referenced matters, the Charging Party, Bakery Local 70, hereby files its Motion to Reopen Part of the Record (8 copies) pursuant to Section 102.47 of the NLRB's Rules and Regulations. Also enclosed please find our Affidavit of Service of said motion on all parties of record.

Please feel free to contact me should you have any questions in this regard.

Respectfully,

PINSKY, SMITH, FAYETTE & KENNEDY, LLP

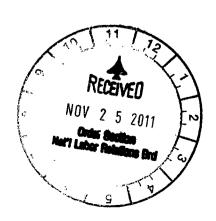
hand Manuel

Edward M. Smith

EMS:lbz Enclosures

cc (w/ enc.): Mr. Orin Holder

Andrew Goldberg, Esq. Joseph Canfield, Esq.



UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD REGION 7

In the Matter of:

KERRY, INC.,

Respondent,

-and-

Case Nos. **GR-7-CA-52965 GR-7-CA-53192**

LOCAL 70, BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO,

Charging Party.

AFFIDAVIT OF SERVICE

Lorna Beth Zaagman, hereby swears under oath that on November 10,2011, Charging Party's Motion to Reopen Part of the Record that she served upon all counsel of record as follows, via United States Postal Service, first-class, postage-paid mail:

Joseph Canfield, Esq. National Labor Relations Board 477 Michigan Avenue, Room 300 Detroit, MI 48226-2569

Andrew S. Goldberg, Esq.
Laner, Muchin, Dombrow, Becker
Levin and Tominberg, Ltd.
515 N. State Street, Ste 2800
Chicago, IL 60610

Lorna Beth Zaagmar

Sworn and subscribed to before me this 10th day of November 2011.

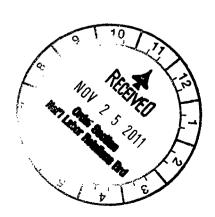
Jamie Grant Kingma, Notary Public

Kent County, MI

My commission expires: 08/20/2013

Executed in Kent County





UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD REGION 7

In the Matter of:

KERRY, INC.,

Respondent,

-and-

Case Nos. **GR-7-CA-52965 GR-7-CA-53192**

LOCAL 70, BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO,

Charging Party.

CHARGING PARTY'S MOTION TO REOPEN PART OF THE RECORD

NOW COMES Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO, Charging Party, and hereby moves the Board pursuant to Section102.48(d)(1) of the National Labor Relations Board Rules and Regulations, to reopen the record so that the attached copy of correspondence from Respondent Kerry, Inc. to "All Kerry Sweet Ingredients Employees - Kentwood" dated 8/8/2003 (distributed to all employees in December 2002) (See attached Motion Exhibit A, hereafter sometimes referred to as "memo") may be admitted as part of the record. This exhibit confirms that Kerry would be paying

beginning January 1, 2003, which is consistent with the Section 6.4 found in the GC 2 - - Collective Bargaining Agreement, effective dates September 1, 2008 to August 31, 2013, and its predecessor R-6 - - CBA effective May 25, 2004 to August 31, 2008, at Section 6.5. This exhibit also includes the additional proviso that an employee must work all of his or her scheduled hours in a week in order to qualify for the daily overtime rate, which is also part of Sections 6.4 and 6.5, respectively.

This proposed exhibit contravenes Respondent's claim made throughout the hearing and through the filing of briefs. In Respondent's Post-Hearing Brief, referring to both GC-2 (CBA 2008-2013) and R-6 (CBA 2004-2008), stated:

"Based on the language, the Respondent had always paid overtime for over 40 hours per week and never over 8 hours per day." (emphasis supplied - Respondent's Post-Hearing Brief, pg 18).

The transcript of the hearing reflects that Andrew Goldberg, the attorney for Respondent and participant in the negotiations in August 2008, testified as follows regarding the August 2008 negotiations:

"The Company has always taken the position with the Union that overtime, therefore, means after 40, and it has **never before this contract and** during this contract paid overtime after 8 hours in a day." (emphasis supplied - Tr. p 217).

Respondent in its brief at page 37 stated:

"...The Respondent presented testimony and documents that since at least before the negotiations over the current contract, the Respondent had not paid daily overtime under any circumstances." (emphasis supplied)

This memo on its face contradicts Respondent's testimony and claims in its Post-Hearing Brief. If admitted, the proposed exhibit would require a different result than that found by ALJ Keltner W. Locke regarding Respondent paying daily overtime.

The ALJ's Decision at page 17, lines 42 through 46, states:

"Credible evidence does not establish that Respondent ever calculated overtime as hours worked in excess of 8 per day. Likewise, credible evidence does not prove that Respondent ever paid overtime on this basis. To the contrary, I conclude that it did not. Therefore, Respondent's computation of overtime as hours worked exceeding 40 per week did not constitute a change in terms and conditions of employment." (emphasis supplied)

Moreover, the ALJ states at page 13, lines 43-46:

"If Respondent's practice had been to pay overtime for hours in excess of 8 per day, then its payment of overtime for hours in excess of 40 per week would constitute a change in working conditions. On the other hand, if Respondent previously had calculated overtime based on hours exceeding 40 per week, then it made no change."

This memo clearly shows Respondent had paid overtime for hours in excess of 8 per day and, thus, Respondent made a unilateral change in opposition to the ALJ's findings.

Since Motion Exhibit A contradicts the basis of the ALJ's Decision regarding overtime pay for over 8 hours/day, it requires a different result.

This memo is credible evidence which supports the testimony of the witnesses for the Charging Party including Orin Holder, Williams Arends and Edras Rodriquez Torres. Each of these Union agents testified that to their knowledge the employees were paid daily overtime when they worked more than 8 hours per day (Tr. 80, 155, 352).

Additionally, the ALJ at page 13 of his Decision (lines 30-34) while quoting Section 6.4, states the language "...doesn't specify who would choose whether to apply the 'in excess of 8 hours per day' or 'in excess of 40 hours per week' definition." The memo communicates clearly that it is not the Employer/Respondent's option¹.

¹ The Charging Party will elaborate more on this issue in its Exceptions to the Administrative Law Judge's Decision to be filed on or before November 22, 2011.

The attached Affidavit of Business Agent Orin Holder (Motion Exhibit B) explains that because of extraordinary circumstances the proposed exhibit was not presented previously and at the time of the hearing.

The Charging Party submits that the circumstances are extraordinary since the memo was distributed and filed by the Local in December of 2002, and discovered later while Business Agent Orin Holder was working on an unrelated matter some 9 years later.

The Charging Party submits that the Board should reopen the record regarding Respondent's paying daily overtime and admit Motion Exhibit A, and also if it deems appropriate, to allow more testimony regarding such exhibit.

Respectfully submitted,

PINSKY, SMITH, FAYETTE & KENNEDY, LLP Attorneys for Bakery Local 70

Dated: November 10, 2011

Edward M. Smith (P20646)

Business Address and Telephone:

146 Monroe Center St NW, Suite 805

Grand Rapids, MI 49503

(616) 451-8496



To:

All Kerry Sweet Ingredients Employees - Kentwood

From:

Julie Turner

CC;

Local Union No. 70, Employee's Personnel File

Date:

Re:

8/8/2003 — Orin-I'm somy. I don't know Why Overtime Pay this is formated to update to current date.

In accordance with the current union contract and with Kerry, Inc. policy, there will be a change in the way that overtime pay is calculated. Overtime pay will no longer be based on hours that are worked in excess of a forty- (40) hour week. Instead, all employees will be paid time and one-half for all hours actually worked in excess of eight (8) hours per day. However, in order to qualify for the daily overtime rate, you must work all of your scheduled hours in the week unless prevented by proven sickness or other similar reason satisfactory to the Human Resource Department.

Please note: This change is effective January 1, 2003. Your payroll check that is dated January 3, 2003 will reflect this change.

If you have any questions or concerns on this matter, please see me.

Thank You.

This was sent to you+. also giver lees back

UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD REGION 7

In the Matter of:

KERRY, INC.,

Respondent,

-and-

Case Nos. **GR-7-CA-52965 GR-7-CA-53192**

LOCAL 70, BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO,

Charging Party.

AFFIDAVIT OF ORIN HOLDER

STATE OF MICHIGAN:

: SS:

COUNTY OF KENT

- I, Orin Holder, being duly sworn before a notary public, state and affirm the following:
- 1. I am the Business Agent for Bakery, Confectionary, Tobacco and Grain Millers International Union, AFL-CIO, Bakery Local 70 since 1996.
- 2. I swear and affirm that Motion Exhibit A dated 8/8/2003 (hereafter sometimes referred to as "memo"), was distributed by Respondent Kerry, Inc. to me and members of the bargaining unit for Kerry, Inc. in

December of 2002. At about that time, the exhibit was placed in one of the Union's "Kerry" files in the normal course of business.

- 3. I swear and affirm that to the best of my knowledge the author of the memo, Julie Turner, was the Human Relations Manager for Respondent Kerry, Inc.'s Kentwood Bakery.
- 4. I swear and affirm that the memo was not reviewed by me since August 2003, because to the best of my knowledge and belief Kerry had followed the daily overtime requirement until it switched to a 4-day workweek in August of 2010, which prompted the filing of the Unfair Labor Charges by Local 70. Unfortunately, the memo was not transferred to the file relating to the Unfair Labor Charges brought against Kerry, Inc. under the National Labor Relations Act, i.e., GR-7-CA-52965; GR-7-CA-53192.
- 5. I swear and affirm that the memo did not come to my attention again until sometime after I received the ALJ's Decision on or about September 29, 2011, some 9 years later.
- 6. I swear and affirm that on or about October 5, 2011 while reviewing another Kerry file involving a completely unrelated matter, I came upon the memo (Motion Exhibit A).
- 7. I swear and affirm that the memo was not presented previously because it had not come to my attention until on or about October 5, 2011.

Further the affiant sayeth not.

Orin Holder

Sworn and subscribed to before me this 10th day of November, 2011.

Lorna B. Zaagman, Novary Public

Kent County, MI

My commission expires: 12/12/2015

Executed in Kent County

RECEIVED NOV 2 5 2011

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GRAND RAPIDS, MICHIGAN 49503

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